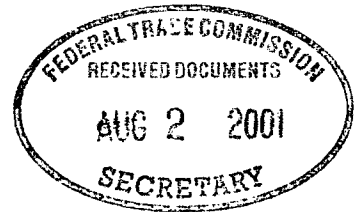


**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**



In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHER-SMITH LABORATORIES, INC.
a corporation,

and

AMERICAN HOME PRODUCTS
CORPORATION,

a corporation.

Docket No. 9297

**COMPLAINT COUNSEL'S OPPOSITION TO
AMERICAN HOME PRODUCTS CORPORATION'S MOTION TO COMPEL**

American Home Products seeks to require complaint counsel to search for responsive documents (i) in the offices of individual Commissioners and their staff who eventually will render a final opinion in this matter, and (ii) in the many open and closed confidential Commission law enforcement investigatory files that are not related or relevant to this case. Complaint counsel already has made available to AHP – through our initial disclosures as well as our responses to AHP's document request – non-privileged materials from the pre-complaint investigation that gave rise to the issuance of the complaint in this matter. Having received the materials from the pre-complaint investigation of this matter to which it is entitled, AHP now seeks those documents to which it is not. AHP's demands are contrary to well-established Commission and federal court precedent and should be denied.

I. AHP is Not Entitled to a Search of the Offices of Individual Commissioners or the FTC's General Counsel.

Complaint counsel has conducted a comprehensive search of agency personnel from the Bureaus of Competition and Economics and other offices within the agency who are reasonably likely to possess materials responsive to AHP's document request. As part of this search, complaint counsel has collected non-privileged responsive documents from: (1) each individual who previously worked, in any capacity, on the pre-complaint investigation; and (2) other agency personnel who had no direct involvement in that investigation but who may have had responsive information, including individuals in the Bureau of Competition's Office of Policy and Evaluation and its International Antitrust Division, the FTC's Office of Public Affairs, and the FTC's Office of Congressional Relations.¹

But AHP is not satisfied. It insists that complaint counsel must also intrude into the offices of individual Commissioners and the agency's General Counsel. Such a search – while certainly a disruption to the Commissioners, and possibly a breach of the Part III *ex parte* rules – will merely uncover privileged materials about the agency's deliberative process that underlie the Commission's unanimous decision to issue the complaint in this matter. This demand is contrary to established Commission precedent and should be rejected. *See, e.g., R.J. Reynolds Tobacco*

¹ See 7/27/01 and 8/2/01 letters from Steve Vieux to Cathy Hoffman (providing updated search list for documents responsive to AHP's document request) (Ex. A).

Co., FTC Dkt. No. 9285, Order (Sept. 26, 1997) (denying respondent's motion to require complaint counsel to search the offices of individual Commissioners and the General Counsel's offices) (Ex. B).²

The rule that respondents in a Commission proceeding are not entitled to the search AHP demands is based on the Commission's structure. Neither the Commissioners nor the General Counsel conduct independent investigations; rather, the Commissioners evaluate the evidence submitted by the staff in conjunction with the complaint recommendation, while the General Counsel provides legal advice to its client (the Commission). And "once a complaint is issued, the Commission becomes a third party to the adjudicative proceeding, with complaint counsel becoming a party." *Champion Spark Plug*, 1980 FTC Lexis 200 at *8 (Dec. 16, 1980).³ Therefore, any search that might occur would likely uncover mostly privileged documents bearing on the Commission's reason to believe that AHP and the other respondents violated the law. To the extent relevant and non-privileged documents might also be found in the files of these offices, they are likely to be duplicates of those already produced by complaint counsel. Requiring the Commissioners, their attorney advisors, and the staffs of the Office of the General Counsel to expend time on such fruitless searches would be a poor use of public resources.

² See also *In re Abbott Laboratories*, 1992 FTC Lexis 296 at *7-8 Order Limiting Respondent's Motion for Issuance of a Subpoena for Production of Records of the Federal Trade Commission (Dec. 15, 1992) (striking instruction "to the extent it purports to require a search of entire Commission for responsive documents; only files in the custody or control of complaint counsel need to be searched").

³ See *Flowers Industries, Inc.* 1981 FTC Lexis 117 at *2 n.3, Order Granting, in part, Motion to Quash Subpoena (Sept. 11, 1981).

Finally, complaint counsel reasonably fear that, if we were required to search the offices of Commissioners, their attorney advisors and the General Counsel, the *ex parte* rules that become effective once a matter goes into administrative litigation could inadvertently be breached. Those rules, which deliberately isolate the Commission and their legal counsel from matters upon which they will subsequently have to render a final opinion, should not be torn down so that AHP can obtain a list that identifies the privileged materials to which it is not entitled.

II. AHP Improperly Seeks Access to the Files of Other Commission Non-Public Investigations

AHP seeks access to the files of any Commission proceeding, investigation, or enforcement action since December 1, 1995, whether pending or closed, that relate in any way to:

- the effect of generic entry on the market share and profits of a brand name pharmaceutical product (*see* AHP Nos. 22-27);
- agreements between a brand name manufacturer and a generic company (*see* AHP Nos. 43-48); or
- the Federal Trade Commission's ongoing study of the pharmaceutical industry. (*see* AHP No. 47).

Contrary to AHP's argument, the law does not require complaint counsel to scour dozens of non-public law enforcement investigatory files⁴ for potentially responsive materials. These are files that Congress and the Commission have treated as confidential and privileged. And complaint counsel have no intention of using or relying on these materials in the prosecution of this matter.

⁴ Responding to AHP's sweeping discovery demands would involve the review of over 1,300 boxes of confidential documents received during the course of over 30 unrelated pending or closed non-public investigations.

A. The Files AHP Seeks Are Protected From Disclosure Absent Complaint Counsel's Reliance on Such Materials

It is well-established that the non-public investigatory files from which AHP seeks production are shielded from discovery by privileges and statutory assurances intended to protect the Commission's law enforcement activities and to preserve the confidentiality of documents submitted during the course of these investigations.⁵ As one ALJ recently concluded: "[T]he only relevant documents in this case are those which relate to the investigation which led to this proceeding, not those which may have been gathered in other [industry] investigations."

Metagenics, Inc., 1995 FTC Lexis 78 at *2, Order Ruling on Metagenics' Motion for Subpoena Duces Tecum (April 10, 1995) (denying request for documents obtained in other investigations).⁶

Indeed, allowing AHP unrestricted access to the files of other investigations (whether pending or closed) would (1) be inconsistent with third parties' expectations of confidentiality; and (2) could interfere with the Commission's ability to conduct on-going and future investigations in the public interest by "chilling" companies' willingness to provide confidential

⁵ Many of the documents in these non-public investigatory files would also be protected by the work product and deliberative process privileges. In this response, however, complaint counsel has not raised specific privilege claims to particular documents or categories of documents. To do so would be extremely burdensome and we believe unnecessary since AHP's basic argument – that it is entitled to materials from unrelated investigatory files even where complaint counsel is not relying on such materials – is contrary to established Commission precedent.

⁶ See also *Flowers Industries, Inc.*, 1981 FTC Lexis 117 at *1 (quashing respondents' subpoena directed at documents "located primarily in files in offices of the Commission other than those of counsel supporting the complaint"); *The Kroger Co.*, 1977 FTC Lexis 55 at *4-5 (Oct. 27, 1977) (denying discovery of the FTC's "prior proceedings, including formal proceedings, investigations, compliance proceedings, and proposed rulemaking proceedings" as beyond the scope of legitimate discovery and denying discovery of the FTC's pending investigations because of the absence of showing good cause); *Sterling Drug, Inc.* 1976 FTC Lexis 460 at *7-8 (March 17, 1976) (same).

information. That is why Congress has designated these files to be confidential and why the Commission has repeatedly refused to release such files absent a showing of “compelling need.” *See Seeburg Corp.*, 70 F.T.C. 1809, 1813 (1966) (“Sensitive information. . . should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission’s confidential files under a lesser standard would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations”).⁷

Statutory Protections for Confidential Documents: The highly sensitive commercial materials sought by AHP have been submitted to the Commission in unrelated law enforcement investigations by targets and third parties in reliance on statutory protections of confidentiality.⁸ The law recognizes a privilege for information provided to the government on a pledge that such information would be kept confidential. As one court has explained in refusing to compel discovery from an FTC investigative file: “Private parties are not permitted to discover information provided to the government by third parties when its disclosure would contravene a strong statutory policy of non-disclosure and the FTC Act embodies just such a policy.” *In re Wheat Farmers Antitrust Class Action Litigation*, 1983-1 Trade Cas. ¶ 65,256 at 69,522 (D.D.C. 1983) (citations omitted).

⁷ See also *The Sperry and Hutchinson Co.*, 69 F.T.C. 1112, 1114 (1966).

⁸ See, e.g., 15 U.S.C. 46(f) (“the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential”); 15 U.S.C. 57b-2(b) (“Except as otherwise provided in this section . . . no documentary material . . . shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material”); 16 C.F.R. § 4.10(d) (barring disclosure except for limited circumstances).

Indeed, where information was provided to the Justice Department's Antitrust Division pursuant to statutory protections of confidentiality – protections that mirror those governing the FTC investigatory files at issue here – a federal district court recognized that these files are shielded by an “absolute” privilege from disclosure. *United States v. AT&T*, 86 F.R.D. 603, 647 (D.D.C. 1980). According to the *AT&T* court, such files could be subject to discovery only where: (1) the party from whom the material was obtained consents to its disclosure; or (2) the government intended to directly use the materials in the pre-trial discovery process or as evidence at the trial. *Id.* at 646. Neither of these exceptions is applicable here. See Section II.B.

The rationale for this “absolute” privilege is clear: If a respondent, such as AHP, could have access to the highly sensitive information contained in the Commission's confidential files, the Commission's ability to conduct non-public investigations and obtain information voluntarily would be severely compromised. For “[d]isclosure of sensitive materials. . . would undoubtedly have a chilling effect on the parties' willingness to provide the confidential information essential to the Commission's fact-finding processes.” *Azko v. International Trade Commission*, 808 F.2d 1471, 1483 (Fed. Cir.), *cert. denied*, 482 U.S. 909 (1986).

Hoechst/Andrx Order: This Court's recent discovery ruling in the *Hoechst/Andrx* proceeding is entirely consistent with the standard set forth by the *AT&T* court. *Hoechst Marion Roussel, Carderm Capital and Andrx Corp.*, 2000 FTC Lexis 134 (Aug. 18, 2000). Just like AT&T in that case and AHP here, respondents in the *Hoechst/Andrx* matter sought to compel complaint counsel to produce documents from unrelated investigatory files. While recognizing that materials from other Commission files “may be relevant” to the complaint allegations or to respondents' defenses, this Court nonetheless concluded that such confidential files should not be

turned over to respondents absent a showing of substantial need. *Id.* at 13-14. By requiring such a heightened showing of need, the Court rejected any suggestion that the mere relevance of certain documents in other files could be sufficient to overcome the applicable privileges. And contrary to AHP's claim (AHP Mot. at 9-10), the Court found the same protection for pending and closed investigatory files because, in either situation:

[T]he rights of third parties who have complied with investigatory demands and the public interest in minimizing disclosure of confidential documents outweighs mere relevance.

Id. at 13-14.⁹

Ultimately, consistent with the approach taken by the *AT&T* court, this Court in *Hoechst/Andrx* strictly limited respondents' access to the government's confidential investigatory files, to those cases where the government intended to directly use such documents in the proceeding:

- patent settlement agreements to the extent that (i) complaint counsel intends to rely on or refer to such agreements in prosecuting its case, or (ii) such agreements have been reviewed or relied upon by a testifying expert for Complaint counsel.
- other documents relied upon, reviewed, consulted or examined by a testifying expert. *Id.* at 14.

B. Complaint counsel does not intend to rely on any documents from the Commission's unrelated confidential investigative files.

Complaint counsel has not relied, and does not intend to rely on, or refer to, in discovery or at trial, documents from any FTC open or closed investigative file, other than FTC File No.

⁹ See *Seeburg Corp.*, 70 F.T.C. at 1813 ("Obviously, the cooperation which the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need. . . has been shown").

991-0256 – the file which gave rise to the issuance of the complaint in this proceeding.

Declaration of Karen Bokar, at ¶ 4 (Ex. C). And complaint counsel has not provided, nor does it intend to provide, to any expert who is anticipated to testify at the trial in this matter documents from any FTC open or closed investigative file, other than FTC File No. 991-0256. Bokar Decl. at ¶ 5. Accordingly, under this Court's order in *Hoechst/Andrx* and similar Commission and federal court decisions, AHP's motion to compel should be denied.¹⁰

AHP's claim that complaint counsel is "relying" on information from other investigations is based primarily on statements made by complaint counsel at the first scheduling conference which reflect complaint counsel's general knowledge of the pharmaceutical industry. AHP Mot. at 10-12 (*see, e.g.*, "Schering didn't perform the normal due diligence on Niacor that a company would perform when licensing a new product"). This claim is misguided on two counts. First, it is both expected and sound public policy that the Commission and its staff would develop general knowledge and expertise of the competitive issues relating to a particular industry through its investigations of that industry.¹¹ To then turn around and open up to discovery in any unrelated proceeding each of these confidential industry-related investigative files precisely because complaint counsel has developed such general knowledge would make no sense and would be "tantamount to a complete disclosure of the Commission's [investigatory] files."

¹⁰ *See Metagenics, Inc.*, 1995 FTC Lexis 78, at *2; *Block Drug Co.*, 1976 FTC Lexis 180, at *2-3, Order Denying Respondents' Motion for the Issuance of a Subpoena Duces Tecum to the FTC (Aug. 20, 1976) (denying respondents' discovery of "relevant material in the possession of the Commission which complaint counsel will not use" in the trial); *U.S. v. AT&T*, 86 F.R.D. at 647 (denying discovery of materials obtained in other government investigations where "[g]overnment does not intend to offer. . . material into evidence").

¹¹ *See, e.g., In the Matter of Subpoena Duces Addressed to Atlantic Richfield Co., et al.*, FTC File No. 741-0019 (June 2, 1978) ("*Arco Statement*").

Sperry and Hutchinson Co. v. F.T.C., 256 F. Supp. 136, 143-44 (S.D.N.Y. 1966). For that reason, the Commission has long rejected providing discovery to respondents under circumstances such as those here. *See Arco Statement*, at 25 (finding that respondents have no right to “be aware of all evidence, information, [and] leads. . . to which opposing Commission counsel have access”).¹²

Second, AHP’s assertion that documents from other government confidential investigations will lose their privileged protection simply because complaint counsel had access to such documents in a different context is inconsistent with the position articulated by the court in *U.S. v. AT&T*. In that case, the court made it clear that the government’s “absolute” privilege for such documents will be preserved except where the government directly uses such materials in either the pre-trial or trial process. *U.S. v. AT&T*, 86 F.R.D. at 647 (“The Government’s claim of privilege clearly is sustained by the statute where the Government does not intend to offer [the] material into evidence in a subsequent action”). The court defined “direct use” of materials to be:

offering the material in evidence at trial, listing it in a pretrial order as material to be introduced in evidence, showing it to a witness in preparing the witness’ testimony at a pretrial deposition or at trial, using it to impeach a witness at pretrial deposition or at trial, formulating interrogatories, demands for admission, or questions to be propounded at a deposition, or similar use.

86 F.R.D. at 647. AHP offers no basis to contradict complaint counsel’s declaration that it does not intend to directly use or rely on particular materials from other confidential investigatory files

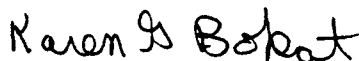
¹² *See also Exxon Corp.*, 1980 FTC Lexis 121 at *7-8 n. 9 (1980) (finding no right to “access to all materials which complaint counsel have examined”); *Standard Oil Co., v. F.T.C.*, 475 F. Supp. 1261, 1275 (N.D. Ind. 1979) (rejecting argument that respondents “are entitled to ‘any evidence’ in the hands of complaint counsel, or that. . . [respondents] are entitled to discovery ‘equal’ to the discovery of complaint counsel”).

in this proceeding. Bokat Decl. at ¶ 4-5. Accordingly, AHP's bid to pry into the other confidential Commission files should be rejected.¹³

III. CONCLUSION

For the reasons discussed above, AHP's Motion to Compel should be denied in its entirety.

Respectfully Submitted,



Karen Bokat
Bradley S. Albert

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: August 2, 2001

¹³ AHP also fails to demonstrate "compelling need" for the Commission's other investigatory files because the information it seeks is "readily obtained from other industry members." *Chuck Full O'Nuts*, 82 F.T.C. 747, 748 (1973). While it may be more "convenient" for AHP to obtain these documents from the Commission's confidential files, the Commission has already established that such a rationale does not meet the "compelling need" test necessary to overcome the privileges asserted by complaint counsel. *Gillette Co.*, 98 F.T.C. 875, 880 (1981).

CERTIFICATE OF SERVICE

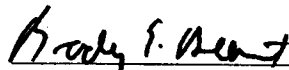
I, Bradley S. Albert, hereby certify that on August 2, 2001, I caused a copy of the Complaint Counsel's Response to American Home Product's Motion to Compel to be served upon the following persons by hand delivery.

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Cathy Hoffman, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Laura Shores, Esquire
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Christopher M. Curran, Esquire
White & Case LLP
601 13th Street, N.W.
Washington, D.C. 20005



Bradley S. Albert

EXHIBIT A



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

July 27, 2001

Via hand delivery

Cathy Hoffman, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: Federal Trade Commission v. Schering-Plough Corporation, et al.
Docket No. 9297

Dear Ms. Hoffman:

Enclosed are complaint counsel's submissions to American Home Products Corporation's First Set of Document Requests. All of the documents are in the following bates ranges: FTC 0000001 - 0002800, FTC 0005000 - 0006696, FTC 0010000 - 0010646, and FTC 0010647 - 0010984. Please note that complaint counsel has extended their search to include: the Bureau of Competition's Division of International Antitrust, Division of Policy and Evaluation, and the FTC's Office of Public Affairs. Complaint counsel reserves the right to supplement its search list, as well as submissions, as needed. If you have any questions or concerns, do not hesitate to call me at (202) 326-2306.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Vieux".

Steve Vieux
Counsel Supporting the Complaint

cc: Laura Shores, Esq.
Christopher Curran, Esq.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

August 2, 2001

Via hand delivery

Cathy Hoffman, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: Federal Trade Commission v. Schering-Plough Corporation, et al.
Docket No. 9297

Dear Ms. Hoffman:

Enclosed is a supplement to complaint counsel's submissions to American Home Products Corporation's First Set of Document Requests. These documents comprise bates range FTC 0010985 - 0011015. Also, complaint counsel has extended their search to include the FTC's Office of Congressional Relations and the Bureau of Competition's Office of the Director. No documents were found in the FTC's Office of Congressional Relations pertaining to this matter, and no non-privileged responsive documents were found in the Bureau of Competition's Office of the Director. Please note that complaint counsel reserves the right to still supplement its submissions, as well as search list, as needed. If you have any questions or concerns, do not hesitate to call me at (202) 326-2306.

Sincerely,

A handwritten signature in dark ink, appearing to read "Steve Vieux", with a stylized flourish at the end.

Steve Vieux
Counsel Supporting the Complaint

cc: Laura Shores, Esq.
Christopher Curran, Esq.

EXHIBIT B

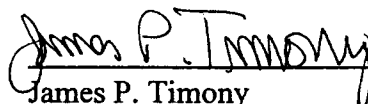
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

_____)	
In the Matter of)	
)	
R.J. REYNOLDS TOBACCO COMPANY,)	DOCKET NO. 9285
)	
a corporation.)	
_____)	

ORDER

Having considered Respondent R.J. Reynolds Tobacco Company's Motion to Compel Interrogatory Responses and Production of Documents, dated September 12, 1997, and Complaint Counsel's Opposition to that Motion, it is hereby ORDERED that Respondent's Motion is DENIED.


James P. Timony
Administrative Law Judge

Dated: September 26, 1997

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories,)
a corporation,)
)
and)
)
American Home Products Corporation,)
a corporation.)
)

Docket No. 9297

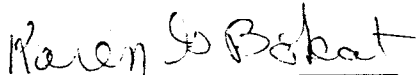
DECLARATION OF KAREN G. BOKAT

I, Karen G. Bokar, declare as follows:

1. I am an attorney employed by the Federal Trade Commission. My business address is 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580.
2. I was lead attorney of the investigation that led to the issuance of the complaint in Docket No. 9297 and currently am lead trial counsel in that proceeding.
3. Based on my role as lead trial counsel, I am aware of the documents complaint counsel currently intends to use during discovery and at the trial in Docket No. 9297. I am also aware of the documents that complaint counsel has provided, and currently intends to provide, to the experts who we anticipate will testify during case-in-chief in this matter.
4. Complaint counsel has not relied, and does not intend to rely, in discovery or at trial on documents from any investigation other than the pre-complaint investigation which led to the issuance of the complaint in Docket No. 9297.
5. Complaint counsel has not provided, and does not intend to provide, to any of the experts who we anticipate will testify during case-in-chief in this matter documents from any investigation other than the pre-complaint investigation which led to the issuance of the complaint in Docket No. 9297.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 2, 2001.

Respectfully submitted,


Karen G. Bokar



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Health Care Division

Bradley S. Albert

Direct Dial
(202) 326-3670

August 2, 2001

Honorable D. Michael Chappel
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith Laboratories, and
American Home Products, Docket No. 9297*

Dear Judge Chappel:

On behalf of complaint counsel, I have enclosed two courtesy copies of Complaint
Counsel's Opposition to American Home Products Corporation's Motion to Compel.

Sincerely,

A handwritten signature in black ink that reads "Bradley S. Albert".

Bradley S. Albert

cc: Cathy Hoffman, Esq.
Laura Shores, Esq.
Christopher M. Curran, Esq.